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No. 87-166

In The
Supreme Court of the United States
October Term, 1987

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GLORIA HILL, Wife of/and THOMAS J. CLANTON,
Petitioners,

vs.

THE CHILEAN LINE, VESSEL SS RENAICO,

and

COMPANIA SUD-AMERICANA DE VAPORES,
Respondents.

—o—

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

WILLIAM E. WRIGHT
GARY A. HEMPHILL
TERRIBERRY, CARROLL & YANCEY
3100 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
504-523-6451

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW

The question presented, we suggest, should more appropriately and accurately be stated: Is there a right to jury trial where the complaint and pretrial order expressly set forth claims for relief in admiralty and invoke the admiralty and maritime jurisdiction of the court; no amendment nor request to amend is made to withdraw the statement identifying the claims as admiralty and maritime; and the party who now complains of the case's having been tried without a jury acquiesced in, and did not object to, the non-jury bench trial in admiralty?

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STATEMENT OF THE CASE

The petitioners, a longshoreman and his wife, were employed by J. Young & Co., Inc., an independent contract stevedore, expressly set forth in the complaint an admiralty and maritime claim, and expressly invoked the admiralty and maritime jurisdiction of the court, against the vessel RENAICO and against The Chilean Line, as owner of the RENAICO, to recover for personal injuries sustained by him June 23, 1982, when cargo being loaded aboard the RENAICO by J. Young & Co., Inc. fell and injured plaintiff's leg.[1]

The pretrial order likewise expressly recited that jurisdiction was based upon the general maritime law.[2]

On Sunday, August 4, 1985, the day before the trial in the district court, the trial judge, the Honorable Morey L. Sear, originated from his chambers a conference call with the attorneys for petitioners and for respondents and informed them that the court had reviewed the complaint and the pretrial order, had read the decision of the Court of Appeals for the Fifth Circuit in the case of *T.N.T. Marine Service, Inc. v. Weaver Shipyards*, 702 F.2d 585 (5th Cir. 1983), *cert. denied* 464 U.S. 847 (1983); and that he wished to discuss the applicability of that decision to this case. Judge Sear was clear: he felt obligated to inform the parties that, in his opinion, jurisdiction rested in admiralty; that, in view of the wording of the complaint and of the pretrial order, and in light of the *T.N.T.* decision, there

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1. Vol. 1, R.A., p. 1.

2. Vol. 1, R.A., p. 158; Vol. 2, p. 311.

was no right to try the case as a civil action with a jury. Petitioners' attorney at first protested against a bench trial in admiralty without jury, but the judge, for the benefit of petitioners' counsel, and for completeness and orderly procedure, said that he would entertain briefs and oral arguments on the issue at 8:00 a.m., Monday, August 5, 1985. He also stated that, in the meanwhile, he would maintain the case as a jury trial to begin at 10:00 a.m. that Monday morning, and would render a final decision whether to proceed with or without a jury after the 8:00 a.m., Monday, argument. However, petitioners' attorney, in that conference telephone call, Sunday, August 4, stated that petitioners did not wish to brief or argue the point, but would agree to allow the case to proceed as a non-jury bench trial in admiralty. Moreover, on the morning of the trial, when the case was called at 10:00 a.m., the trial proceeded as a non-jury bench trial in admiralty, without the slightest hint of objection by petitioners.[3]

REASONS WHY THE CASE SHOULD NOT BE REVIEWED BY THIS COURT

No constitutional issue is in any way involved, and petitioners' assertion that one is has no basis at all. Petitioners were not entitled to a jury trial. Furthermore, petitioners did not preserve any constitutional issue when they did not amend or attempt to amend the complaint, but proceeded to trial before the court without a jury without rais-

3. Vol. 2, R.A., p. 380.

ing or even hinting objection to the case proceeding as a non-jury bench trial in admiralty.

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ARGUMENT

No constitutional issue was ever involved and none was preserved. Petitioners consented to try the case as a non-jury bench trial in admiralty.

Rule 9(h) of the Federal Rules of Civil Procedure provides that a pleading

> ". . . within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims."

Rule 38(e) of the Federal Rules of Civil Procedure provides that the identification of a claim as an admiralty or maritime claim carries with it the procedural consequence of a non-jury trial, reciting, in pertinent part, that the Rules are not to be construed—"shall not be construed"—to create

> "a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

See also, Rule 8(e)(1), providing that no "technical forms of pleading or motions are required."

With the unification of the admiralty rules, it was necessary to preserve those historical procedures that tra-

ditionally attach to actions in admiralty, not the least of which was the non-jury trial. *See*, Fed.R.Civ.P. 9(h) Advisory Committee Notes. The solution, simple in nature, that was applied was the preservation in Rule 9(h) of the petitioners' right to choose the procedural consequences of a civil or of an admiralty action, by choosing the jurisdictional basis of the action and designating that basis in the complaint. This solution complied with the existing procedural choice provided by the "saving to suitors" clause, codified in 28 U.S.C. 1333(1), the effect of which is that a suitor who holds an *in personam* claim, which might be enforced by a suit *in personam* in admiralty, may also, at his election, file suit at "common law," by the filing of an ordinary civil action, in state court or in federal court (as to the latter, given diversity and jurisdictional amount), without reference to admiralty. Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975), p. 37. Rule 9(h), in providing that a reference to admiralty resulted in the invocation of admiralty procedure, was designed to mandate, and does mandate, that all suits invoking admiralty jurisdiction continue to carry with them the election of the procedural consequences attendant upon all admiralty cases, and admiralty procedure, notwithstanding the unification of civil and admiralty rules.

The complaint in this case, as well as the pretrial order, specifically invoked, pursuant to Rule 9(h), *supra*, the admiralty and maritime jurisdiction of the district court. In fact, in the very first paragraph, the complaint alleges:

> "The jurisdiction of this Court is based upon the general maritime law and all statutes and laws of the

> United States pertinent thereto and the damages herein exceed $10,000 per complainant."[4]

The pretrial order recites in paragraph 4:

> "Jurisdiction in this matter is based upon the General Maritime Law, as well as diversity of citizenship and jurisdictional amount. Jurisdiction is uncontested."

Therefore, when plaintiffs invoke the court's admiralty and maritime jurisdiction, as petitioners did in this case, the case is a non-jury case in admiralty, and this is in no way altered by the fact that the petitioners seek to confuse the situation by alleging diversity and requesting a jury. *Durden v. Exxon Corp.*, 803 F.2d 845 (5th Cir. 1986); *T.N.T. Marine Service, Inc. v. Weaver Shipyards*, 702 F.2d 585 (5th Cir. 1983), *cert.denied* 464 U.S. 847 (1983); *Fisher v. Danos*, 671 F.2d 904 (5th Cir. 1982); *William P. Brooks Construction Co. v. Guthrie*, 614 F.2d 509 (5th Cir. 1980); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975); *Goldsby v. The Celotex Corporation*, 591 F.Supp. 615 (W.D.Mo. 1984); *Oroco Marine, Inc. v. National Marine Service, Inc.*, 71 F.R.D. 220 (S.D. Tex. 1976); *Gilmore v. Witschorek*, 411 F.Supp. 491 (E.D.Ill. 1976); *Williams v. The Shipping Corporation of India, Ltd.*, 354 F.Supp. 626 (S.D.Ga. 1973); *Anderson v. The American Oil Company of Baltimore, Maryland*, 60 F.R.D. 676 (S.D.Ga. 1973); *Alaska Barite Co. v. Freighters Incorporated*, 54 F.R.D. 192 (N.D. Cal. 1972); *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F.Supp. 798 (D.P.R. 1969); *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374 (D.Md. 1967).

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4. Vol. 1, R.A., p. 1.

Petitioners also contend that the case should have been tried to a jury because the pretrial order referred to a jury and the case was originally assigned as a jury trial. A review of the pretrial order reveals that the parties stipulated the court's admiralty and maritime jurisdiction,[5] and, consequently, under the jurisprudence outlined above, the reference in the pretrial order to a jury trial was ineffectual surplusage and of no consequence.

The petitioners, therefore, were not entitled to a jury trial, and the district court was correct in holding the trial as a non-jury trial in admiralty. When petitioners alleged in the complaint, and repeated in the pretrial order, that the claim was one of admiralty jurisdiction, they were required thereafter to follow and to accept all the procedural consequences of the jurisdictional choice they had made; one of the first and most elementary of which was trial by the admiralty judge and not by jury.

The petition in this Court contains statements entirely outside the record, and relating to a telephone conference, Sunday, August 4, 1985, which require respondents to respond, particularly in view of petitioners' gratuitous and untrue statement the case proceeded to trial without a jury "over counsel for [petitioners'] objection"; and that "no record was made of such since it was Sunday afternoon on the eve of trial and counsel for petitioners received the telephone call at his home."

The telephone conversation was a three-way conference call, originated by the court from chambers. The court advised the attorneys for both parties that the court

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5. Vol. 1, R.A., p. 158; Vol. 2, p. 311.

was of the opinion, in light of the Fifth Circuit decision in the *T.N.T. Marine Service* case, *supra,* that the case should be tried as a non-jury trial in admiralty, and directed that the issue be briefed and argued before the court at 8:00 a.m. on Monday, August 5, to permit the court to make a final ruling on the issue in time to proceed with a jury trial at 10:00 a.m. if that proved to be the final ruling. Counsel for petitioners replied by stating that they would not contest the case being held as a non-jury bench trial in admiralty. Accordingly, when the trial commenced at 10:00 a.m. on Monday, August 5, it proceeded as a non-jury bench trial, without objection and without so much as a hint of any objecting comment from petitioners. The case, therefore, properly proceeded as a non-jury trial: first, because petitioners, as a matter of law, were not entitled to jury trial; second, because, during the pretrial telephone conference the day before, petitioners expressly waived whatever right they might have had; and, finally, because they made no objection to the bench trial in admiralty on the morning of the trial. A plaintiff waives a previously requested right to jury trial when he proceeds to trial before the court without objecting. A *post hoc* challenge of the court's proceeding without a jury is not permitted. *Bass v. Hoagland,* 172 F.2d 205 (5th Cir. 1949), *cert.denied* 338 U.S. 816 (1949); *National Family Insurance Co. v. Exchange National Bank of Chicago,* 474 F.2d 237 (7th Cir. 1972) *cert.denied* 414 U.S. 825 (1972); *Chapman v. Kleindienst,* 507 F.2d 1246 (7th Cir. 1974); *Southland Reship, Inc. v. Flegel,* 534 F.2d 639 (5th Cir. 1976). The rationale of these holdings is obvious: a party cannot be allowed to build error into the trial by his own waiver and inaction.

In view of this, petitioners were not entitled to a jury trial; the holdings of the lower courts were not erroneous. No constitutional issue is involved. Alleging in the complaint that the claim was in admiralty, the petitioners took upon themselves, and were required thereafter, to follow all of the procedural consequences of their jurisdictional choice. One of the first and most elementary of these was trial by the admiralty judge and not by jury. The pretrial order confirmed petitioners' claim that the case was one grounded in admiralty under the general maritime law. They at no time amended the complaint as they would have been required to do as prerequisite to a belated effort to get a jury trial. Finally, they accepted and acquiesced in the case's being tried as a non-jury trial in admiralty, and thus waived any right they might have had—and they had none—to try the case before a jury.

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CONCLUSION

We submit that no constitutional issue is involved. The petitioners were not entitled to a jury trial, and the district court, and the Court of Appeals, were correct in concluding that the case was properly one for trial as a bench trial in admiralty. Further, no issue regarding petitioners' right to a jury trial was preserved, because petitioners consented to try the case as a non-jury admiralty matter.

The petitioners have had their day in court. The judgments of the lower courts are correct, and there is no justification for the issuance of a writ.

Respectfully submitted,

TERRIBERRY, CARROLL & YANCEY
/s/ WILLIAM E. WRIGHT
GARY A. HEMPHILL
3100 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
504-523-6451

Attorneys for Respondents